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No. 84-1491

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
Appellants,

v.

MAURICE S. HEPPS, *et al.*,
Appellees.

On Appeal from the Judgment
of The Supreme Court of Pennsylvania

MOTION OF CAPITAL CITIES COMMUNICATIONS, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., TRIBUNE COMPANY, AND WESTINGHOUSE BROADCASTING AND CABLE, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Capital Cities Communications, Inc., CBS Inc., National Broadcasting Company, Inc. ("NBC"), Tribune Company, and Westinghouse Broadcasting and Cable, Inc. respectfully move for leave to file the accompanying brief as *amici curiae* in support of appellants Philadelphia Newspapers, Inc., *et al.* Appellants have consented to the filing of this brief, but appellees have not.

Each of the parties filing this motion, by itself or through its wholly-owned subsidiaries, broadcasts news and public affairs programming over television and radio stations owned or operated by it. Capital Cities, CBS, and Westinghouse each owns and operates a television station within Pennsylvania. CBS and NBC own and operate television and radio networks that provide news and public affairs programming to television and radio stations located within Pennsylvania and elsewhere

throughout the country. Capital Cities is a party to an agreement with American Broadcasting Companies, Inc. ("ABC") subject to approval by the Federal Communications Commission to become the owner of ABC's television and radio networks. All of the moving parties or their subsidiaries own and operate television and radio stations in major metropolitan markets outside of Pennsylvania, and, in addition to their television and radio holdings, Capital Cities and Tribune, or their subsidiaries, publish newspapers that are disseminated in and outside of Pennsylvania.

This appeal presents significant questions in the law of defamation. The decision by the Supreme Court of Pennsylvania upheld the validity of a Pennsylvania statute that required the defendants to prove the truth of a newspaper article relating to a matter of public concern. At least four other states follow a similar rule, and more than half of the states have yet to develop rules on this question since the decision of this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Under the burden allocation sustained by the court below, a publisher or broadcaster may be held liable for uttering true speech on an important matter of public interest because it was unable to persuade a jury of the statement's truth by at least a preponderance of the evidence. In addition, it can be held negligent in assessing the statement's truth on the basis, in part, of a presumption that the statement never was true at all. A decision by this Court affirming that allocation therefore would have a major effect on companies such as the moving parties herein that disseminate news and public affairs programming throughout the country.

The questions presented in appellants' jurisdictional statement relate to the constitutionality of the Pennsylvania statute insofar as it applies to newspapers. This Court's decision cannot be limited to newspapers, however. The Pennsylvania statute that was sustained by the

court below applies to all actions for defamation, including actions against broadcasters such as the parties to this motion. The constitutionality of the statute as it applies to broadcasters is a question of law that has not adequately been presented by the parties to this case and that, because of the statute's unrestricted scope, is relevant to its disposition. It is respectfully submitted that the attached brief *amicus curiae* by the broadcasters that join in this motion will provide the Court with additional insight into that question.

For the foregoing reasons, Capital Cities, CBS, NBC, Tribune, and Westinghouse respectfully request that the Court grant them leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED BY THE APPEAL

1. Does not a Pennsylvania statute that requires a defendant publishing or broadcasting a matter of public concern to bear the burden of proving the truth of its publication or broadcast as a defense to a private figure defamation action violate the First Amendment and the Due Process Clause because it creates a significant risk that constitutionally protected speech will be punished erroneously?

2. Does not such a statute violate the rule of *Gertz v. Robert Welch, Inc.* by absolving the plaintiff of part of the constitutional requirement that it prove that the defendant acted with fault in assessing falsity?

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Capital Cities Communications, Inc., CBS Inc., National Broadcasting Company, Inc. ("NBC"), Tribune Company, and Westinghouse Broadcasting and Cable, Inc., as *amici curiae*, submit this brief in support of appellants Philadelphia Newspapers, Inc., *et al.*, to urge that the judgment of the Supreme Court of Pennsylvania be reversed and that the judgment in favor of appellants by the Court of Common Pleas of Chester County, Pennsylvania be reinstated.

INTERESTS OF THE AMICI CURIAE

Capital Cities, CBS, NBC, Tribune, and Westinghouse, by themselves or through wholly-owned subsidiaries, own and operate television and radio stations in major metropolitan areas throughout the United States that broadcast news and public affairs programming. Capital Cities, CBS, and Westinghouse each own and operate television stations within Pennsylvania. CBS and NBC own and operate television and radio networks that provide news and public affairs programming to television and radio stations located within Pennsylvania and elsewhere throughout the country. Capital Cities has applied to the Federal Communications Commission for approval to merge with American Broadcasting Companies, Inc., which also owns such television and radio networks. Capital Cities and Tribune, or their subsidiaries, also publish newspapers that are disseminated in and outside of Pennsylvania.

The questions presented in this appeal have a major bearing on defamation law as applied in Pennsylvania to the publication of matters of public concern. Since each of the *amici curiae* publish and broadcast such matters on a daily basis within Pennsylvania, the decision in this case will affect each of them directly. In addition, since the holding of the court below is in accord with scattered decisions in other states and, if affirmed, is likely to be followed in an increasing number of states, the effect of this Court's decision on the parties to this brief extends far beyond their operations within Pennsylvania.

Appellants are a Pennsylvania newspaper publisher and its employees, but the decision of the court below applies to broadcasters as well. The parties to this brief are broadcasters, and they do a major portion of the news reporting in this nation. The special insights of electronic journalism may be of assistance to the Court in addressing the issues presented by this appeal.

STATUTE INVOLVED

This case involves the constitutionality of a provision of the Pennsylvania Judicial Code, 42 Pa. C.S. § 8343(b), which reads:

> "In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
>
> (1) The truth of the defamatory communication."

The provision is part of the Defamation Subchapter of the Judicial Code, 42 Pa. C.S. §§ 8341-8345, the full text of which is set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

The question presented by this case is whether a rule requiring a defendant to prove the truth of his statement about a matter of public concern to avoid liability for defamation is consistent with the First Amendment and the Due Process Clause. Pennsylvania established such a rule in its early common law as the outgrowth of a presumption in favor of a libel plaintiff's good reputation, and the rule became codified in the Pennsylvania Judicial Code at 42 Pa. C.S. § 8343(b)(1). In the decision below, the Supreme Court of Pennsylvania held that the statute is valid, finding no conflict with the First Amendment. _____Pa. _____, 485 A.2d 374 (1984).

The decision of the court below was in error. It permits the punishment of accurate news reporting, a result that is intolerable in our constitutional system. Burdens of proof are more than procedural tools; they are society's way of tipping the scales of justice in support of or opposition to a particular cause. By tipping the scales against free speech about public affairs, Pennsylvania has made a judgment at odds with the paramount importance that this nation has long and wisely accorded to

disseminating information about such matters. The practical effect of that judgment on news organizations is to discourage — under threat of substantial damages — the reporting of important information that reasonably is believed to be accurate unless the news organization is prepared to undertake the burden of proving accuracy to a factfinder. That burden is significant, particularly in the world of broadcast journalism, which so often must deal with fast-breaking news events of exceptional importance.

Pennsylvania's requirement that the defendant in a libel case involving matters of public concern prove the truth of his statement violates the First Amendment. Truthful speech about such matters is and must be protected under the Amendment, and forcing the defendant to prove truth means that erroneous factfinding in close cases where the evidence appears equally balanced will result in punishment of protected expression. The Pennsylvania law also violates the Due Process Clause because due process requires the use of procedures in a case such as this one that will give the benefit of the doubt to protected speech, a protection Pennsylvania does not afford.

In addition, the allocation of the burden of proof in Pennsylvania violates the requirements under the First Amendment established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Under *Gertz*, a private figure plaintiff in an action involving speech about a matter of public concern must prove that the defendant acted without reasonable care in assessing falsity. The Pennsylvania rule absolves a plaintiff of part of that burden by allowing falsity, an essential element of fault, to be established by a mandatory rebuttable presumption.

ARGUMENT

I. REQUIRING A DEFENDANT TO PROVE THE TRUTH OF A STATEMENT ABOUT A MATTER OF PUBLIC CONCERN VIOLATES THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE BECAUSE THE REQUIREMENT PERMITS PUNISHMENT AND DETERRENCE OF SPEECH CONTAINING TRUE STATEMENTS OF PUBLIC IMPORTANCE.

In *Garrison v. Louisiana*, 379 U.S. 64 (1964), this Court, without dissent, held that the First Amendment prohibits the punishment of true statements about public affairs. The case dealt with a prosecution for criminal libel, but the Court made clear that its holding applied to civil defamation as well. The holding was unequivocal: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." 379 U.S. at 74.

In the twenty years since *Garrison*, this Court has struggled to define the appropriate balance between First Amendment interests and the protection of reputation that is the objective of defamation law. Although the members of this Court have disagreed about where to mark that balance, there has been no disagreement about the need to protect the dissemination of truth about public affairs. Most of the Court's efforts have been directed to measuring the extent of "strategic protection" that must be afforded to *false* defamatory speech "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974), *quoting NAACP v. Button*, 371 U.S. 415, 433 (1963); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). This case does not deal with the prophylactic protection of false speech. Instead, in its most fundamental element, it deals with a rule permitting substantial damages for the utterance of

speech that is true. It thus runs afoul of the basic principles that all members of this Court have found to be common ground.

Pennsylvania has decreed that defamatory speech is presumed to be false unless the defendant can prove to a finder of fact by a preponderance of the evidence that the statement is not false. Under this rule, a jury that has doubts about the proper outcome of a case is directed to give the benefit of those doubts to the plaintiff and to conclude that the speech at issue is false and outside the realm of constitutional protection. The First Amendment and the Due Process Clause of the Fourteenth Amendment do not tolerate the burden that this rule places on the free speech interests recognized in *Garrison*. Because of the rule, speech that is true can be subject to monetary sanctions because of failure of the defendant to present evidence that, in the jury's mind, tips the scales of proof in its favor. The Pennsylvania scheme thus violates the First Amendment because it permits punishment for true statements about public affairs. It violates the Due Process Clause because it does not provide an adequate procedural safeguard in the way that it separates speech which is constitutionally protected from that which is not.

The First Amendment and due process questions in a case such as this one are intertwined and best dealt with together. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958). They require an assessment of the competing demands for free expression and vindication of harm to reputation. Two of this Court's decisions already provide significant guidance on how those demands should be accommodated, and they are an appropriate starting point for analysis.

A. Under *Garrison v. Louisiana*, the First Amendment Prevents Punishment of True Speech.

As noted, *Garrison* held that true speech may not be the subject of sanctions for defamation, even though the true defamatory speech was made with ill will. The decision was based largely on this Court's decision in *New York Times Co. v. Sullivan, supra*, 376 U.S. 254, which, according to the Court in *Garrison*, held that the Constitution "absolutely prohibits punishment of truthful criticism." 379 U.S. at 78. Reviewing the balance struck in that case, the Court observed that, "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Id.* at 72-73 (footnote omitted). Thus, *New York Times* held "that a public official might be allowed the civil remedy only if he establishes that the utterance was false. . . ." *Id.* at 74. *Accord, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 8, 10 (1970); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).

Garrison thus established that the constitutional protection of truth can require that a plaintiff bear the burden of proving a statement's falsity before he may recover. The decision was limited to speech related to public affairs (379 U.S. at 72 n.8) — what since has become known as "matters of public concern" — but that limitation has no bearing on this case. The newspaper articles at issue here concerned organized crime and the use of connections with criminal elements identified in state investigative documents to obtain favors and to avoid legal impediments. The articles discussed violations of Pennsylvania liquor laws and the use of influence by a state senator to aid the plaintiffs in their activities. These surely are matters "of political, social or other concern to the community" sufficient to satisfy even the narrowest

definition of "matters of public concern." *See Connick v. Myers*, 461 U.S. 138, 146 (1983); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. _____, 53 U.S.L.W. 4866 (1985) (plurality opinion); *cf. Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). *Garrison* therefore should afford them protection.

Of course, *Garrison* dealt with actions brought by the Government or by public officials, but the Court's reasoning should apply with equal force to actions by private-figure plaintiffs — at least when matters of public concern are involved. The public interest in receiving truthful information about such matters is not less merely because the person suing is not a public official or public figure. As discussed in Part I.C. below, an analysis of the competing interests in a case such as this one confirms that fact. Under the reasoning of *Garrison*, therefore, the burden of proof applied in Pennsylvania is invalid under the First Amendment because it punishes the utterance of true statements about public affairs.

B. Under *Speiser v. Randall*, Due Process Requires That the Person Seeking To Punish Speech Prove That the Speech Is Not Protected Under the First Amendment.

The due process protection afforded to protected speech was addressed by this Court in *Speiser v. Randall*, 357 U.S. 513 (1958). That case dealt with a California statute that required a person claiming an exemption from property taxes to declare on his tax return that he did not advocate the unlawful overthrow of the government. The statute placed upon the taxpayer the burden of proving that he did not engage in the unlawful speech set forth in the statute and stated that, if the taxpayer did not meet that burden, he could not claim a tax exemption. This Court held that the California statutory scheme was unconstitutional.

In reaching this conclusion, the Court observed that the states' broad discretion to formulate rules allocating burdens of production and persuasion is circumscribed when the burden allocation is used to determine whether speech is constitutionally protected. The Court explained:

> "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance and of persuading the fact-finder at the conclusion of the trial .... Where the transcendant value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellant engaged in criminal speech."
>
> 357 U.S. at 525-26 (citations omitted).

So long as the burden of proof remained with the taxpayer, there was a danger that legitimate speech that fell close to the line separating it from unlawful speech would be penalized because of an error in factfinding. *Id.* at 526. Because this result was intolerable under the First Amendment and principles of due process, the Court held the statutory scheme invalid.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court invalidated a Maryland statute that prescribed a scheme for prior approval of motion pictures by a board of censors before they could be exhibited. Examining the statute, the Court held that it failed to afford sufficient procedural safeguards to obviate the First Amendment dangers of a censorship system. Among the reasons for the invalidation was that it placed on the exhibitor the burden of proving that a particular motion picture was constitutionally protected expression. Quoting *Speiser, supra*, the Court held that the burden of proving that the film was not protected expression had to be placed on the person seeking such a declaration. 380 U.S. at 58-60. *Accord, Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (mail statute regarding obscene materials).

Speiser and the cases following it make clear that when a state wishes to impose or authorize a sanction for the utterance of speech, such as defamation, that is not protected by the First Amendment, it must place on the person seeking the sanction the burden of proving that the speech is not within the protected realm of expression. The Pennsylvania statute sustained by the court below fails to comply with that fundamental rule. The state's allocation of the burden of proving truth therefore violates the First Amendment and the Due Process Clause. Although this Court has not yet had the occasion to apply the *Speiser* doctrine to defamation law, there is nothing about the distinction between true and false defamatory speech that should require an application of the doctrine different from distinguishing speech that does or does not pose a violent threat to the Government or speech that is or is not obscene. The analysis of competing interests in the next segment of this brief confirms this conclusion.

C. The Prohibition Against Punishment of True Speech and the Requirement That the Person Seeking To Punish Speech Prove Its Lack of Constitutional Protection Both Apply to Defamation Actions by Private Figures Involving Matters of Public Concern.

Garrison establishes that the line separating defamatory speech that is constitutionally protected from that which is not is defined by the statement's truth. *Speiser* teaches that the burden of proving that speech transcends that line must fall on the party seeking damages to punish it. The conclusion that the Pennsylvania statute is invalid should follow from these two cases *a fortiori*. These cases were the results of a careful balancing of the interests that are at stake in this area of the law, and, while subsequent decisions of this Court have fine-tuned that balance for defamation cases as circumstances varied, the later decisions continue to point to the constitutional infirmity of the Pennsylvania burden of proof statute.

Those recent decisions have established different tiers of protection for three types of cases. The highest tier is reserved for cases involving alleged defamation of public officials or public figures, in which the First Amendment interest is especially strong and, due to the public figures' assumption of the risk of publicity and greater recourse to self-help remedies, the state interest in protecting them from the hazards of free speech is not very great. A second level of protection applies to those who are not public officials or public figures when the matters stated about them are of general concern to the public. Because of the public interest in the subject matter, the need for First Amendment protection remains at a high level but the increased need for protection of private-figure plaintiffs raises a counter-balancing state interest. The third tier is reserved for plaintiffs who are neither public officials nor public figures and speech that

does not relate to matters of public concern. Here, the First Amendment interest in such speech is lower than for the first two categories, while the state's interest in protecting the private figures' reputation remains high. *See Dun & Bradstreet, supra,* 53 U.S.L.W. 4866; *Gertz, supra,* 418 U.S. 323; *New York Times, supra,* 376 U.S. 254.

This case falls within the second category of cases in the three-part structure. The trial court determined that the plaintiffs were not public figures, and defendants have not challenged that determination. The newspaper articles in question clearly dealt with a matter of public concern. The First Amendment balance in this case therefore must be struck in accordance with those decisions that have defined the level of protection for allegedly defamatory speech involving private figures and matters of public concern. *See Gertz, supra*. Because this case involves a procedural statute, the decision also requires consideration of the effect of the procedure at issue on the First Amendment interest at stake. *See Mathews v. Eldrige,* 424 U.S. 319, 335 (1976).

The First Amendment interest to be weighed in this balance, the freedom to speak and publish truthful material about public affairs, is very high. A basic objective of First Amendment protection is to assure unrestricted exchange of ideas for bringing about political and social change. *New York Times, supra,* 376 U.S. at 269; *Roth v. United States*, 354 U.S. 476, 484 (1957). Discussion of public affairs therefore "is at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), *quoting Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As this Court stated in *Garrison, supra,* "speech concerning public affairs is more than self-expression; it is the essence of self-government." 379 U.S. at 74-75. Such speech "occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special

protection." *Connick, supra,* 461 U.S. at 145, *quoting NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980). *See Dun & Bradstreet, supra,* 53 U.S.L.W. at 4868-69 (plurality opinion).

The effect of the burden of proof statute on this First Amendment interest is the same as that analyzed in *Speiser, supra,* 357 U.S. 513. By creating a mandatory rebuttable presumption of falsity, it requires that close cases be decided against protected speech, posing a substantial risk that true speech will be punished erroneously. *Cf. Francis v. Franklin*, 471 U.S. _____, 105 S. Ct. 1965 (1985); *County Court of Ulster County v. Allen*, 442 U.S. 140, 157-60 (1979). In addition, the Court in *Speiser* observed that this risk of mistaken factfinding poses a further risk of free speech infringement because the possibility of error will be likely to inhibit other speech in an effort to avoid the danger of liability. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." 357 U.S. at 526. There will be a tendency to say not what the speaker reasonably believes to be true, but only what he believes he can *prove* to be true. *New York Times, supra,* 376 U.S. at 279. *See also Rosenbloom, supra,* 403 U.S. at 50 (plurality opinion). The tendency may be reinforced by the knowledge that, of the 19 damage verdicts in defamation actions brought by private figures and reported from 1982 through 1984, five exceeded $1,000,000 and eight exceeded $100,000. *See LDRC Study No.* 5, Libel Def. Resource Center Bull. No. 11, Nov. 15, 1984, at 16. These risks of erroneous deprivation and deterrence of free expression could be eliminated if the burden of proof were shifted away from the speaker.

The heavy constitutional interest at stake and the burden that the Pennsylvania statute imposes on that interest require that the Pennsylvania statute be invalidated unless Pennsylvania can demonstrate an overriding state interest that justifies maintaining the current statutory scheme. This Court has identified two state interests that may be pertinent. The first is protection against intrusion into certain aspects of the plaintiff's privacy about his person. *Rosenbloom, supra,* 403 U.S. at 48 (plurality opinion). But this interest has no relevance here, since the case involves a matter of public concern that, by definition, is not private. *Id. See also Garrison, supra,* 379 U.S. at 73 n.9; *Cox Broadcasting, supra,* 420 U.S. 469.

The second interest, which is the more prominent concern in defamation law, is protection of the plaintiff's "desire to preserve his public good name and reputation." *Rosenbloom, supra,* 403 U.S. at 48 (plurality opinion). This Court has recognized that when the plaintiff is not a public figure or public official, the state's interest in affording this protection is "strong and legitimate." *Gertz, supra,* 418 U.S. at 348. *Accord, Dun & Bradstreet, supra,* 53 U.S.L.W. at 4868. Nonetheless, faced with the need to balance this "strong" state interest against the fundamental First Amendment interest in permitting speech on matters of public concern, this Court has held that the state interest must yield. As the Court stated in *Rosenblatt, supra,* 383 U.S. at 86, "when interests in public discussion are particularly strong . . . the Constitution limits the protections afforded by the law of defamation." Thus, when faced with a claim by a private figure plaintiff involving speech about public affairs, the Court has concluded "that the state's interest is not substantial relative to the First Amendment interest in public speech." *Dun & Bradstreet, supra,* 53 U.S.L.W. at 4869 n.7 (plurality opinion; emphasis deleted).

Significantly, *Gertz* held that, even in private-figure cases, there must be some protection for false defamatory speech about public affairs so that true speech about such topics will not be chilled. 418 U.S. at 340-50. Since the balance struck in *Gertz* requires protection for *false* speech about public affairs, it necessarily follows that the First Amendment provides complete protection of *true* defamatory speech in such circumstances. Even those members of this Court who have opined that *Gertz* afforded too much protection to false speech nevertheless have suggested that a plaintiff should be permitted to vindicate harm to his reputation only "upon proving falsity." *See, e.g., Dun & Bradstreet, supra,* 53 U.S.L.W. at 4872 & n.3 (White, J., concurring). Accordingly, because the Pennsylvania burden or proof statute permits the imposition of penalties for the utterance of true speech in close cases by an erroneous factfinder, it must be invalid under the First Amendment.

While the state interest in reputation in itself is not sufficient here to justify the Pennsylvania statute, the opinion of the court below also identified some procedural justifications for the rule. The addition of these interests still is insufficient to override the First Amendment, however.

First, the court below observed that the Pennsylvania rule developed as a historical extension of the principle that a person accused of wrongdoing is presumed innocent until proven guilty. The Pennsylvania decisions reasoned that a person defamed had been accused of guilt and that he therefore should be presumed to have a good character until proven otherwise. As part of the presumption of good character, the decisions presumed that the defamatory charge leveled at the plaintiff was false. 485 A.2d at 378. This historical explanation identifies no state interest in support of the rule other than

the state desire to protect reputation and to create a margin of error in favor of those claiming to have been defamed. As already demonstrated, the state's interest in protecting reputation is not in itself sufficient to permit the burden allocation that Pennsylvania has chosen.

A second reason identified by the court below was, oddly enough, that the rule serves to protect a libel *defendant* by safeguarding him from the prejudice that would result if the plaintiff were to produce evidence of his good character (including the falsity of the statement) at trial. "[S]uch evidence would . . . take advantage of the defendant who was unapprised of its nature or . . . raise a collateral issue not made by the pleadings in the case." 485 A.2d at 379 n.l. The court below does not appear to have seriously relied upon this justification, and the transparency of the argument is readily apparent. As the court acknowledged, character evidence is admissible in cases in which character and reputation are directly in issue. *Id.* And as the Pennsylvania treatise cited by the court acknowledges, that is precisely the case in an action for defamation. 1 G. Henry, *Pennsylvania Evidence* § 155 (1953). Character is an essential issue in determining whether a person was defamed, and, apart from liability, evidence of damage to character and reputation often will have to be presented to establish "actual harm" entitling a private plaintiff to compensatory damages. *See Gertz,* 418 U.S. at 348-50. Thus, a presumption of good character and falsity cannot be designed to protect an unsuspecting defendant from evidence he did not expect to encounter.

The main reason identified by the court below to justify placing the burden on the defendant was that a contrary rule would be unfair to the plaintiff because falsity would be too difficult for the plaintiff to prove. 485 A.2d at 378; *see Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 450-51, 273 A.2d 899, 908-09 (1971). In fact, however, proving truth or falsity often may be difficult for *either*

party, and, while the decision of the court below implies that truth will more easily be established by the defendant, that is hardly axiomatic. As this Court observed in *New York Times, supra,* 376 U.S. at 279, "Even courts accepting [the defense of truth] as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars." In this connection, it should be noted that proof of truth can present special difficulties for television news organizations, which may be forced to establish the truth not just of scripts or articles that they created, but of ambiguous television pictures that may be subject to a defamatory interpretation. Proof by the broadcaster that it had reasonable grounds to believe that the defamatory interpretation of the video was true (a burden that the defendant does not bear under *Gertz*) would be far easier than proving that the defamatory interpretation of the video shown is, in fact, the true one.

The lower court's suggestion that it is more "fair" to place the burden on the defendant than on the plaintiff apparently was based on two propositions. First, the court suggested that the defendant possesses the greater knowledge about the subject matter of his accusation and therefore is in a better position to prove its veracity. The court buttressed this view by pointing out that Pennsylvania accords a statutory "shield law" privilege to press organizations under which they may refuse to disclose the sources of information in their news reports. 485 A.2d at 386-87.

This reasoning is fallacious. The statement giving rise to the action for defamation will be about the plaintiff himself, and, obviously, the plaintiff will know more about that subject than will the person making the statement. Thus, Wigmore has observed that placing the burden of proving truth in a defamation case on a defendant

is *inconsistent* with the general principle that the burden of proof should be placed on the party that has peculiar means of knowledge about the subject at issue. 9 J.H. Wigmore, *Evidence in Trials at Common Law* § 2486, at 291 (Chadbourn rev. 1981). A state shield law does not change that fact. Although the statute might protect from discovery some of the information in the defendant's possession, it cannot alter the fact that the plaintiff still has superior knowledge about his own affairs. This aspect of the lower court's "fairness" rationale thus is misconceived.

The other apparent basis for the "fairness" assessment deals with hypothetical facts different from those presented by this case. The newspaper articles at issue here, which take up 30 pages of the joint appendix, contained detailed factual information setting forth the allegedly defamatory charges of which plaintiffs complain. The court below, however, posited a different situation in which the alleged libel was broad and lacking in specificity, and it suggested that proving the falsity of such a charge would be unfair because the plaintiff would not know the particular events forming the basis for the generalized charge and would be forced to "prove a negative." 485 A.2d at 378. The perception that there is something inherently wrong in requiring proof of a negative allegation is belied, however, by the numerous instances in which the law, including the law of Pennsylvania, imposes such an obligation. *See, e.g.*, 9 Wigmore, *supra*, § 2486, *citing, e.g., Carl v. Grand Union Co.*, 105 Pa. Super. 371, 161 A. 429 (1932). *See also McCormick on Evidence* § 337, at 949 (3d ed. 1984). In any event, any difficulties that may be posed by such a requirement relate merely to the production of evidence and are not of sufficient magnitude to justify an infringement upon speech about public affairs.

The professed concern that a plaintiff will not know what specific evidence to produce to rebut a general

defamatory accusation is divorced from the realities of modern litigation. Even in a state that grants news organizations the protection of a shield law, the allegedly defamed plaintiff will be able to engage in a variety of discovery to explore the nature of the charges and their specifics. At trial, the plaintiff can meet his burden of production by generally denying the accusation, thereby shifting to the defendant the burden to produce evidence, if he has any, that the statement is true. Shifting burdens of production are common in American law (*see generally McCormick, supra,* § 338), and such a system would satisfy the concerns raised by the court below. Of course, Pennsylvania is free to create what it believes is a better system to deal with production of evidence regarding general negative averments, but here it has employed a system that shifts the ultimate burden of persuasion on the question whether speech is constitutionally protected. "The separation of legitimate from illegitimate speech calls for more sensitive tools than [Pennsylvania] has supplied." *Speiser, supra,* 357 U.S. at 525.

Despite the emphasis by the court below on the purported unfairness of requiring a plaintiff to prove falsity, that court's decisions in related areas of the law disclose that such "unfairness" has not been an overwhelming concern. For example, Pennsylvania, like most states, recognizes a sister tort to defamation which provides redress for charges disparaging a person's property or goods. *See, e.g., Menefee v. Columbia Broadcasting System, Inc.*, 458 Pa. 46, 329 A.2d 216 (1974). Despite the action's similarity to defamation, Pennsylvania requires the plaintiff to prove the falsity of the disparaging statement to recover. *See, e.g., Menefee, supra,* 458 Pa. at 53, 329 A.2d at 220; *Young v. Geiske*, 209 Pa. 515, 58 A. 887 (1904). *See also Paul v. Halferty*, 63 Pa. 46, 3 Am. Rep. 518 (1870); *Hygienic Fleeced Underwear Co. v. Way*, 35 Pa. Super. 229 (1908). This rule is in accord with the

general common law outside of Pennsylvania. *See* Restatement (Second) of Torts § 651(1)(c) & Comment *b* (1977). Similarly, although the case law is sparse, it appears that Pennsylvania and other jurisdictions also require a plaintiff to prove falsity to recover for the invasion of privacy tort known as "false light." *See, e.g., Martin v. Municipal Publications*, 510 F. Supp. 255, 259 (E.D.Pa. 1981); *Uhl v. Columbia Broadcasting Systems, Inc.*, 476 F. Supp. 1134 (W.D. Pa. 1979); *Anderson v. Low Rent Housing Commission*, 304 N.W.2d 239 (Iowa), *cert. denied*, 454 U.S. 1086 (1981).

These cases find no "unfairness" in the plaintiff's need to prove falsity. The disparagement cases explain the different burdens for defamation and disparagement solely on the ground that there is a historical presumption in favor of a defamed person's good character, but no similar presumption in favor of his property. *See Young, supra*, 209 Pa. at 519, 58 A. at 888. Ironically, as a result of this difference, Pennsylvania would accord greater protection to speech affecting a person's property and economic interests than to that involving matters of public concern about individuals. The disparagement and privacy cases show that fairness can be afforded if the plaintiff is made to prove falsity and that the contrary rule for defamation stems merely from a historical inclination to tip the scales of justice against a challenge to a person's good name. *Cf. McCormick, supra*, § 337, at 950 (rule probably reflects policy of handicapping truth as a disfavored defense). That inclination cannot justify infringement of First Amendment rights.

In sum, Pennsylvania can advance no interest sufficient to permit imposition of a penalty for truthful speech about matters of public concern. The burden allocation sustained by the court below fails to accord such speech the measure of protection required by the First Amendment and infringes upon rights of expression in a

manner forbidden by the Due Process Clause. The requirement that a libel defendant prove truth in a case involving matters of public concern therefore should be declared invalid.

II. REQUIRING A DEFENDANT TO PROVE THE TRUTH OF A STATEMENT ABOUT A MATTER OF PUBLIC CONCERN VIOLATES THE FIRST AMENDMENT BECAUSE FALSITY IS AN ELEMENT OF THE FAULT THAT THE CONSTITUTION REQUIRES THE PLAINTIFF TO ESTABLISH.

The Pennsylvania burden of proof allocation also is invalid because it violates the rule of *Gertz, supra*, 418 U.S. at 347-48, which held that a plaintiff may not recover damages for the utterance of false defamatory speech about a matter of public concern unless he proves that the false statement was uttered with "fault" on the part of the defendant. That decision permitted the imposition of liability upon proof that the defendant was negligent in assessing the statement's truth before publication, and the opinion of the court below made clear that Pennsylvania would apply such a negligence standard to determine fault in cases brought by private figures. *See* 485 A.2d at 384. The lower court failed to recognize, however, that to prove negligence under *Gertz*, a plaintiff also must prove falsity.

The negligence that the plaintiff must establish under *Gertz* is lack of due care by the defendant in assessing the truth or falsity of his statement before he publishes it. As Justice Powell observed in *Cox Broadcasting, supra*, "It is fair to say that if the statements are true, the standard contemplated by Gertz cannot be satisfied." 420 U.S. at 499 (concurring opinion). *See also Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976) ("demonstration that an article was true would seem to preclude finding the publisher at fault"). Although the

Court has spoken frequently of the connection between the "defense of truth" (an inaccurate phrase since, as the court below noted, 485 A.2d at 379 n.2, falsity is an element of the tort) and the requirement of fault, it has not addressed that connection in terms of the burden of proof. Analysis of the fault requirement makes clear, however, that the two are so "inevitably linked" that their proof must go hand in hand. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir. 1981), *cert. dismissed*, 454 U.S. 1130 (1982).

As the court in *Wilson* explained:

> "It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of a statement without first determining whether the statement was false. The publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false. . . . Fault then must be held to consist of two elements: carelessness and falsity."
>
> 642 F.2d at 375 (footnote omitted).

A jury cannot assess the defendant's fault unless it assesses the facts concerning his carelessness together with those concerning the statement's veracity. *Id; cf. Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. _____, 104 S.Ct. 1949 (1984) (relationship between falsity and proof of "actual malice"). Contrary to the suggestion of the court below (485 A.2d at 385 n.13), proof of carelessness in fact gathering alone cannot be enough to satisfy *Gertz* because carelessness is not actionable under *Gertz* unless it leads to an untrue statement.

Pennsylvania permits the plaintiff to establish the falsity element of the fault requirement under *Gertz* by

relying solely on the mandatory presumption of falsity created by the burden of proof statute, but the defect in that system is clear. A state cannot permit satisfaction of an element of proof required by the Constitution by creating a mandatory presumption that it exists. "Such a presumption is inconsistent with the federal rule." *New York Times, supra*, 376 U.S. at 283-84; *see Wilson, supra*, 642 F.2d at 375-76. Because the Pennsylvania burden of proof allocation absolves a libel plaintiff from proving a constitutionally required element of recovery, the allocation may not be permitted to stand.

In rejecting the argument that falsity is an element of the fault that must be proven by a plaintiff under *Gertz*, the court below disclosed a misunderstanding of the *Gertz* decision. That misunderstanding stemmed from confusion about the complicated relationship between a fault requirement and the various elements of a cause of action for defamation.

There are many aspects of a libel case that may implicate the negligence or other fault of the defendant. For example, he may have been careless in communicating or "publishing" the defamatory message to a third person, careless in assessing whether the message was true or false, or careless in determining whether the message would tend to harm the reputation of the plaintiff. At common law, these different aspects of fault were subsumed within the general rule that the defendant could be held liable only if he acted with "malice" (a level of fault theoretically greater than negligence), and that malice was presumed from the defamatory statement; thus, in effect, there was no real fault requirement and recovery was based on strict liability. There were two exceptions. First, apart from "malice," the plaintiff was required to prove that the defendant had acted with negligence or other fault in communicating the defamatory statement to a third person. Second, if the defendant demonstrated that the statement was "privileged" or

"justified" by some overriding public purpose, the plaintiff could defeat that defense by, *inter alia*, demonstrating that the defendant was negligent in assessing the statement's veracity. *See* Restatement (Second) of Torts § 580B, Comment *b* (1977); Restatement of Torts § 601 (1938); W.L. Prosser, *Handbook of the Law of Torts*, § 113 at 771-76, § 115 at 795-96 (1971).

Pennsylvania law followed these rules. *See, e.g., Barr v. Moore*, 87 Pa. 385 (1878) (presumption of malice); *Clark v. North American Co.*, 203 Pa. 346, 354, 53 A. 237, 239-40 (1902) (adhering to presumption); 42 Pa. C.S. § 8344 (fault in publication to third persons); *Neeb v. Hope*, 111 Pa. 145, 2 A. 568 (1886) (permitting proof of negligence to negate defense of privilege); 42 Pa. C.S. § 8342 (same); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 410 (E.D. Pa. 1978) (summarizing law). However, the cases emphasized the need for fault under the exceptions. *See, e.g., Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939) (requiring fault with respect to publication to third persons and asserting that this requirement and cases relying on fault to negate privilege defense meant state was not imposing strict liability).

The court below surveyed this landscape and concluded that, wholly apart from *Gertz*, Pennsylvania law already required sufficient proof of fault to meet constitutional standards. In particular, it found that the required proof of negligence in communicating a statement to third persons placed the state's law within constitutionally permissible bounds. 485 A.2d at 384-86. Thus, the court emphasized, "Under the law of this Commonwealth there is no liability for civil libel unless plaintiff can at least establish that the *dissemination* occurred as a result of lack of due care" and that the Constitution is satisfied "as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's

willful or negligent conduct in *publishing* the defamatory matter." *Id.* at 385-86 (emphasis added). Accordingly, the court concluded that fault with respect to publication or some element of defamation other than the assessment of truth is sufficient to satisfy the requirement of *Gertz*. Since the fault does not have to be related to veracity, the court rejected the argument that proof of fault and falsity must take place together. *Id.*

The lower court's analysis of the constitutional fault requirement misconceives *Gertz*. This Court made clear in that case that the fault with which the Court was concerned was that relating to assessment of truth. Twice it repeated that the purpose of the requirement is to eliminate the danger that the defendant could be held liable "even if it took every reasonable precaution to ensure the accuracy of its assertions." 418 U.S. at 346; *see id.* at 347 n.10. The Court thus sought "to identify a standard of care with respect to the truth of the published facts" that would prevent inhibition of true speech. *Cox Broadcasting, supra*, 420 U.S. at 499 n.3 (Powell, J., concurring). The lower court's suggestion that this standard could be met by requiring, for example, proof of negligent publication therefore was clear error. That requirement existed before *Gertz*, and *Gertz* determined that it was not sufficient to protect First Amendment rights. *See* Rest. 2d Torts *supra*, § 580B, Comment *d*; *Prosser and Keeton on the Law of Torts* § 113 (5th ed. 1984). Because the lower court failed to perceive the essential link between falsity and the fault required by *Gertz*, it erred in deciding that the burden of proving falsity need not be placed on the plaintiff in proving fault under the First Amendment.

In sum, a plaintiff cannot prove that a defendant acted carelessly in assessing the truth of a defamatory statement without proving that the statement in fact was untrue. The Constitution forbids the establishment of untruth by the fiction of a mandatory presumption. Be-

cause the Pennsylvania burden of truth statute has precisely that effect, its application to defamation cases involving matters of public concern is invalid.

CONCLUSION

The Pennsylvania burden of truth statute, 42 Pa. C.S. § 8343(b)(1), violates the First and Fourteenth Amendments to the Constitution of the United States. It permits punishment of the truthful reporting of news about public affairs and thereby creates a serious risk that such reporting will be inhibited. The Constitution cannot permit that result.

The court below reversed a judgment in favor of defendants solely because the trial court refused to follow the unconstitutional burden of proof allocation in the Pennsylvania statute. This Court should reverse the Supreme Court of Pennsylvania and direct that the judgment in favor of the defendant-appellants be reinstated.

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Appendix.

PENNSYLVANIA CONSOLIDATED STATUTES

TITLE 42, JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 83, PARTICULAR RIGHTS AND IMMUNITIES

SUBCHAPTER D, DEFAMATION

§ 8341. Single publication limitation

(a) Short title of section.—This section shall be known and may be cited as the "Uniform Single Publication Act."

(b) General rule.—No person shall have more than one cause of action for damages for libel or slander, or invasion of privacy, or any other tort founded upon any single publication, or exhibition, or utterance, such as any one edition of a newspaper, or book, or magazine, or any one presentation to an audience, or any one broadcast over radio or television, or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

(c) Bar by judgment.—A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication, or exhibition, or utterance, as described in subsection (b), shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication, or exhibition, or utterance.

§ 8342. Justification a defense

In all civil actions for libel, the plea of justification shall be accepted as an adequate and complete defense, when it is pleaded, and proved to the satisfaction of the jury, under the direction of the court as in other cases, that the publication is substantially true and is proper for

public information or investigation, and has not been maliciously or negligently made.

§ 8343. Burden of proof

(a) Burden of plaintiff.—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

(b) Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern.

§ 8344. Malice or negligence necessary to support award of damages

In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the

jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.

§ 8345. No liability when without power of censorship

Liability shall be denied and no recovery shall be allowed against the owners, licensees and operators of any visual or sound radio and television station or network of stations or against the agents, servants or employees of such owner, licensee or operator, for the publication, utterance or broadcasting of any defamatory matter, where the publication, utterance or broadcasting thereof is not subject to their censorship or control by reason of any Federal statute or any regulation, ruling or order of the Federal Communications Commission.